89-41

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No..

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

HELEN T. MONAGLE, Petitioner

against

Anthony M. Frank, Postmaster General of the United States, Respondent

On Writ of Certiorari To The United States Court of Appeals For The First Circuit

---

PETITION FOR WRIT OF CERTIORARI

Helen T. Monagle
78 Bristol Road
Medford, Massachusetts
Pro Se

QUESTIONS PRESENTED.

1. Did the Honarable David S..Nelson for the U. S. District Court of Massachusetts err in his opinion dated May 31, 1988.

2. Did the U. S. Court of Appeals for the First Circuit err when they failed to allow the petitioner enlargement of time.

3. Did the U. S. Court of Appeals for the First Circuit err when they failed to assist an unrepresented petitioner by explaining in a clear and non-hostile manner any questions which may arise concerning the procedures of the Appellate Court.

4. Did the U. S. Court of Appeals for the First Circuit deny the petitioner due process of law in their "Order" of Court entered June 6, 1989 when they "constructively recalled mandate, and denied motion for enlargement of time and re-issue mandate.'?

QUESTIONS PRESENTED CONT'D.

5. Was the decision of Honorable David Nelson U. S. District Court, District of Massachusetts in conflict with the decision of Honorable District Judge Richey, District of Columbia.
6. Did the U. S. District Court of Massachusetts and the U. S. Court of Appeals for the First Circuit failed to recognize the failure of the United States Postal Service to follow their own internal Affirmative Action Plan.

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Failure of this court to order the U. S. Court of Appeals for the First Circuit for re-hearing in banc on the merits of complaint will work to deprive her of rights granted to all citizens under the Constitution of the United States and will leave her without remedy at law for the injury she

has already suffered and subject to sufferance of further irreparable injury from the conduct of respondent.

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APPENDIX

1. Affirmation from the U.S. Court of Appeals for the First Circuit 4/25/89.
2. Motion for enlargement of time to file a petition for re-hearing in banc dated 5/25/89.

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3. United States Court of Appeals for the First Circuit Order of Court entered June 6, 1989.
4. Letter dated 7/30/81 from Patricia J. Barry, Attorney at Law to Katherine Shanahan, EEO Administrative Officer U.S. Postal Service, General Mail Facility, Boston, MA 02205.
5. Letter to Katherine F. Shanahan, Manager, Employee Relations, Boston, MA Subject: Charge of Reprisal, July 30, 1981 from Attorney at Law, Patricia J. Barry.
6. Memorandum for Regional Directors and Field Directors Human Resources, Subject: Official Time - Mitchell v. Baldridge from the United States Postal Service, Employee Relations Dept.

Petitioner prays that a writ of certiorari issue to review the action of the United States District Court in the District of Massachusetts and the United States Court of Appeals for the First Circuit in this case.

JURISDICTION

This petition for certiorari has been filed within 90 days of the entry of the order of the Court of Appeals on April 25, 1989 denying petitioner's Motion for Enlargement of time to file a petition for re-hearing In Banc filed May 25, 1989. This Court's jurisdiction to review the order below is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be...deprived of life, liberty, or property, without due process of law....."

Amendment XIV Section I of the United States Constitution provides:

> "no state shall....deny to any person

within its jurisdiction the equal protection of the laws"

STATUTES INVOLVED

Section 7 of the Age Discrimination in Employment Act of 1967, 42 U.S.C. (§623(a) provides:

"It shall be unlawful for an employer (1) to...discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age..."

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a) provides:

"All personnel actions affecting employees in the United States Postal Service.... shall be made free from any discrimination based on....sex....."

STATEMENT OF THE CASE

Petitioner is a 65 year old female who has been employed in the Management Sectional Center of the United States Postal Service in Boston, Massachusetts since 1967. From 1967 through 1976 she was assigned as a distribution clerk in the Mail Processing Division. In 1976 she was assigned as a clerk stenographer in the Safety Section. In 1978 she applied for and was awarded the position of Safety Technician, EAS-11. This was advertised as an "Upward Mobility Opportunity". The next step for progression for the petitioner would be an EAS-14. Upward Mobility positions normally require automatic promotion...the same principle as the management trainee's program. Management by utilizing the enlargement of the area of consideration denied thepetitioner the automatic promotion required by the Affirmative Action Plan. When the males held the same positions as the petitioner, past practice shows that they received the promotion. No woman had ever gone beyong an EAS-11 in the Safety Section.

The selectee Frank Dunford was assigned to the Postal Inspection Service in Springfield, Massachusetts thus making him ineligible for an upward mobility position in the Boston Management Sectional Center. The selectee did not have job-related experience as required by the "uniform Guidelines on Employee Selection Procedures" but was made best qualified in violation of the "Uniform Guidelines on Employee Selection Procedures. The petitioner was best qualified because of her specialized experience in the Safety Section from 1976 to 1980 wh which included some duties and responsibilities of the EAS-14 position advertised The petitioner was rated as excellent in the Mail Processing Register for Supervisors and rated Good in the Station/ Branch Register for Supervisors. The petitioner had received a special achievement award and other awards. The petitioner's name was illegally removed from the Mail Processing Register without the knowledge and consent of thepetitioner.

This action was commenced on November 25, 1980. The complaint alleged that practicesengaged in by respondent violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(a) and that such practices entitled the petitioner to, along with other relief, retroactive promotion to the position of Safety Specialist 14, liquidated damages in the form of back pay in the amount of the difference between what petitioner would have earned from the date on which she should have been promoted and what she actually earned since that date, and an injunction against respondent ordering him to accord petitioner all the benefits and rights enjoyed by employees similarly situated..

Petitioner sought administrative (official) leave of eight hours each, both on April 7, 1981 and on July 28, 1981 in order to be present at depositions taken during discovery in the instant

suit on the former date, and to prepare for an administrative hearing on her sex discrimination complaint on the latter date. The Postal Service denied her official time in both instances.

The petitioner filed a timely charge of reprisal with the Postal Service concerning the denial of official time on the above-named dates on July 30, 1981. No investigation was conducted, although regulations require that one be made immediately. Ms. Monagle served a Notice of Intent to Sue on the Equal Employment Opportunity Commission on August 19, 1980, pursuant to 28 U.S.C. §633a(d). This notice was served within 180 days of the occurrence of the actions complained of, and 30 days prior to filing the instant suit. The petitioner, therefore, met the jurisdictional prerequisite for bringing her age discrimination claims before the Court.

The petitioner filed[15] a timely charge of reprisal on the denials of administrative (official) leave on July 30, 1981. 29 CFR 1613.262(b)(1) requires that the federal agency conduct an investigation within fifteen days of receipt of the charge. No investigation was conducted by the Postal Service. Ms. Monagle has exhausted her administrative remedy in order to bring her charge of reprisal before this Court.

REASONS FOR GRANTING THE WRIT

Failure of this court toorder the U. S. Court of Appeals for the First Circuit for re-hearing in banc on the merits of complaint will work to deprive her of rights granted to all citizens under the Constitution of the United States and will leave her without remedy at law for the injury she has already suffered and subject to sufferance of further irreparable injury from the conduct of respondent. The petitioner expresses a belief, based on a

reasoned judgment that this appeal involves one or more questions of exceptional importance. Can the U. S. Postal Service deny employees equal protection by limiting the decision of a U. S. District Court Judge, Honorable Judge Richey, District of Columbia to the District of Columbia employees?

First, to deny plaintiff's request would be to ignore the broad mandate of Title VII, The Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972 were designed to afford to those suffering from discrimination an efficacious remedy, unencumbered by unnecessary difficulties and obstacles. For that reason, it must be, and has been, liberally construed to achieve its objectives. Davis V. Bolger, 596 F. Supp. 559, 23 FEP Cases 1159 (D.D.C. 1980); see also Barnes v. Costle, 561, F.2d 983, 15 FEP Cases 456 (D.C. Cir. 1977). Davis involved a challenge to the federal policy of allowing federal emplo-

yees who testify in a[17] Title VII case to take administrative leave only if they appear on behalf of the government. Davis held that Title VII prohibited the government from denying administrative leave to employees who testify against the government in a Title VII case. The decision was grounded on a principle that is directly relevant to this action; the federal government's interest in eradicating discrimination in its ranks prevents it from treating a Title VII plaintiff any less favorable than it treats itself for the purposes of the litigation. This was precisely the principle that the government ignored in the Davis Case. By granting administrative leave only to those employeeswitnesses who testify for the government, the government put a Title VII, for ce certain Title VII provisions are designed to provide...the Title VII plaintiff with a slight 'boost' over his employer-defendant as a means of rectifying the imbalance of strength and resources in herent in their

relationship, and of facilitating the redress of injuries caused by discrimination. 496 F. Supp. at 564 Nor were those statutory 'boosts' to plaintiffs the only reason for finding that the government's partiality violated Title VII. As Davis so correctly found, the government's actions could not be justified on the theory that it has an interest in defeating discrimination claims against it and thus are not assisting the "otherside". For, as Davis noted, In a Title VII lawsuit the plaintiff in a very significant sense is not on the"other side." The United States has a substantial interes — of its own in the elimination of discrimination on account of race, sex, age, or physical handicap in its ranks - an interest at a minimum sufficient to preclude the creation of artificial obstacles in the path of those whose actions tend to vindicate that interest, whatever their own private motives may be. These points are directly pertinent to plaintiff's

motion. As plaintiff notes, defendant Baldrige, who is sued in his official capacity as Secretary of Commerce, is not present at pre-trial proceedings or at trial. Instead, he is literally represented by agency counsel. Agency counsel does not serve at those proceedings as Secretary Baldrige's lawyer - the United States Attorney serves that function - but as an occupant of the defendant's shoes. And the salary paid to agency counsel fully covers time at depositions, meetings with the United States Attorneys, and otherfacets of pre-trial preparation. Thus, plaintiff's situation is analogous to the one condemned in Davis: the government pays for time expended on pre-trial proceedings by "defendant," but it will not do the same for plaintiff.

Moreover, allowing plaintiff to take administrative leave to prepare for trial is consistent with the broad objectives of Title VII. Both plaintiff and defendant have an interest in vindicating plaintiff's

rights, if he has indeed been the victim of discrimination. A plaintiff like this one who depends upon his salary, and who may face substantial hardship if forced to use annual leave when he must be preparing for litigation, may well face a choice between his livelihood and his lawsuit. This is utterly inconsistent with the "boost." that Title VII provides plaintiffs in other regards. Defendant argue that Davis is limited to court appearances by witnesses and should not be extended to cover time for trial preparation. The Court, however, can see no reasoned way to draw this distinction. If anything, the argument for allowing a plaintiff to take administrative leave in order to prepare for trial is stronger as it is the plaintiff's rights that are at issue in the lawsuit. To allow witnesses to be paid for their trial participation and to deny the allegedly injured plaintiff the right to prepare those witnesses without further financial hardship would make little sense indeed.

This holding is thoroughly consistent with related case law and administrative practice. First, Title VII plaintiffs in suits against the government are allowed paid leave while they pursue their claims through the administrative process. Under 29 C.F.R. §1613.214(b) a complainant is entitled to a "reasonable amount of official time to present his complaint.." This extends not only to the administrative hearings but to preparation for those hearings as well. See WWO Management Directive No. 403 §6c at 2 (Sept.1983) The required administrative enforcement procedure complements the judicial remedy together, the administrative and judicial avenues for relief provide the Title VII plaintiff with a full mechanism for vindicating rights and eradicating employment discrimination. See e.g., Brown v. General Services Administration, 425 U.S. 820, 831, 12 FEP Cases 1361 (1976). There is no reason for paying plaintiff for prehearing activity at the administra-

tive level and refusing to make the same payment for the same activity when the same claim is in a different forum. The government's interest in eliminating any possible discrimination is the same, and plaintiff's claims surely are no different.

Moreover, this particular plaintiff's claim for paid leave is particularly strong. A successful Title VII plaintiff is entitled to reimbursement for vacation leave, or for unpaid leave, that was used for pre-trial activities. Despite defendant's claims that reimbursement for trial preparation is never permitted, there is no question that plaintiff could be retroactively reimbursed for reasonable pre-trial expenses if he prevails in his suit. Kyles v. Secretary of Agriculture, 604 F. Supp. 426, 437 N. 21, 37 FEP Cases 12 (D.D.C. 1985) Laffey v. Northwest Airlines, 572 F. Supp. 354, 32 FEP Cases 770 (D.D.C. 1983) aff'd in part and remanded in part on other

grounds, 746 F. 2d 4, 35 FEP Cases 1609 (D.C. Cir. 1984). cert. denied 472 U.S. 1021, 37 FEP Cases 1816 (1985).

Although plaintiff is not a 'prevailing party' in the strict sense of that term, neither is he an untested litigant. This case is now on remand to this Court. Plaintiff has already had a trial and an appeal on his claims, and the Court of Appeals for this Circuit has found that plaintiff made out a prima facie case of discrimination and may be able to show that defendant's alleged rationales for its actions were pretextual. Mitchell v. Baldrige, 750 F. 2d 80, 37 FEP Cases 689 (D.C. Cir. 1985).

Petitioner was denied administrative leave April 22, 25, and 26, 1988 for court preparation of EEO Case.

Thus plaintiff, while not a "prevailing party" had advanced claims that have withstood some scrutiny. Although this is not dispositive, it is yet

another factor that mitigates in favor of plaintiff's request. For the above-mentioned reasons, the Court will grant plaintiff's motion. The Court, is howevere, concenred that plaintiff receive compensation only for time reasonably expended in pre-trial activity and that such leave be consistent with the standards set forth in EEO Management Directive No. 403. This includes reasonable time for attendance at depositions, meetings with counsel, other ordinary and legitimate pre-trial undertakings that require the presence of the plaintiff, and attendance at trial.

Denial of submitting reprisal evidence by the Court (T2-124L8-13) Foundation was laid when K. Shanahan admitted she received the letteraddressed to her and sent by Attorney Barry regarding (A.p.43) reprisal. One of the major tenets of any type of nonjury proceeding is that the rules of evidence, whether common law rules the federal rules of evidence, are

not applied strictly. (Donnelly v. Garment Co. v. NLRB, 123 F 2d 215, 224 (8th Cir. 1941); see generally Mezines, Steing & Gruff "Admissibility of Evidence." 4 Admin. Law 22-5 (1980). This is because the trier-of-fact is "presumably competent to screen out and disregard what he thinks he should not have heard, or discount it for practical and sensible reasons. (Multi Medical Convalescent & Nursing Center of Towson v. NLRB, 550 F. 2d 974, 977 (4th Cir. cert. denied 434 U.S. 835 (1977). Although administrativeagencies may be freed from observance of strict "rules of evidence for jury trials, it is erroneous to suppose that agencies do not, as a result, observe some "rules of evidence'.. (Administrative Procedure in Government Agencies; Report of theAttorney General's Committee on Administrative Procedure, 70 (Washington, D.C. 1941) ("Discretion must be allowed..as it is to judges in equity proceedings; governed by principles of

commonsense and fairness.") Obviously, the rules of evidence that don't apply nor are strictly adhered to are those rules which are jury oriented and exclude evidence (In opp. Cotton Mills v. Adm. of Wage and Hour. Div. of Dept. of Labor. 312 U.S. 126 155 (1941).

Hearsay is viewed from a perspective of any trained legal judge; little weight can be placed on evidence that's not a product of cross-examination unless it is a hearsay exception showing reliability. (Elkouri at 94-95). and a decision will not be based on hearsay alone when it is contradicted by evidence produced from cross-examination (Continental Paper Co. 6 LA 727, 728 (1951). Hearsay "cannot by itself, serve as substantial evidence..when it is contradicted by all the other evicence in the record (Martin v. HEW, 492 F.2d 905 (4th Cir. 1974) or is "lacking sufficient assurances of its truthfulness...to overcome.. credible sworn testimony." McKee v. United

States, 500 F. 2d 525, 528 (Ct. Cl. 1974) The weight to be accorded to hearsay may be governed by several conditions (Sch. Bd. of Broward Cty. Fla. v. HEW, 525 f 2d 900, 905, 906 (5th Cir. 1976) accord Wathen V. United States, 527 F. 2d 1191 (Ct. Cl.1975) cert denies 97 S. Ct. 69 (1976). (1) the out-of court declarant hasno bias or interest in the outcome; (2) the statement/report is available prior to the hearing; and the opposing side could compel the appearance of the out of court decisrant for examination; (3) the hearsay statement does not have inconsistencies on its face; and (4) the statement is a report (medical, scientific, etc.,) which is generally recognized by the courts. (In short, hearsay exception = reliable hearsay.) Rules of evidence requiring admission of evidence are to be followed even under the "relaxation of evidentiary rules" atmosphere. (NLRB v. Decker & Sons, 569 F. 2d 357, 363 (5th Cir. 1978) (prior felony convictions of witnesses

may be given little weight but evidence may not be excluded.) This type of observance regarding the rules of evidence is generally true whether an agency is subject to the Administrative Procedure Act; those not subject to the APA; those agencies which have enablingstatutes which refere to courtroom evidentiary rules; and those agencies which refer to the rules of evidence so applying only in their regulations. (Mezines Stein & Gruff supra note 16 at Chapter 22. p. 6-9 and 26, see, e.g., 29 C.F.R. 1613.218 (...rules of evidence shall not be applied strictly.) This is because in all of the above the only real theme involved is whether the evidence is found to be "irrelevant, immaterial, or unduly repititous." (Id., 5 U.S.C. §556(d). The controlling factor in moving evidence into the record at the administrative hearing is relevancy. (Supra note 18 at 70-71; see also supra not 21 at 22-24. Therefore, it should come as no surprise to learn that hearsay is admissible - up to the point of relevancy - in federal

administrative hearings. (K.C. Davis, Adm. L. Treatise, at 338 (1976 Supp.) see also supra note 21 at 26-9 and infra note 25. Hearsay "may constitute substantial evidence supportive of a finding by the trier-of-fact adverse to the claimant...(Richardson v. Perales, 402 U.S. 389, 402 (1971). But this type of hearsay must be of a "rational probative force" and the witness who made the hearsay statement could be subject to cross examination even though the claimant doesn't have that right. (Id. at 407-408,402). The Trier-of-fact must maintain his objectivity, he must insure that the agencies' actions are both fair and thorough, and he must "assist an unrepresented claimant by explaining in a clear and non-hostile manner any questions which might arise concerning the procedures at the hearing or the way in which evidence of the claimant's (case) might best be presented. "(Brittingham, supra 79; cf. Hackley at 140 n. 130) ("Thus it may be particularly oppressive to bind legally unsophisticated employees to complex and difficult choices made without adequate assistance at the agency level...")

and Richerson v. Jones, 572 F2d 89, 95 (3d Cir. 1978) (regarding Title VII procedural requirements not to be interpreted stringently when a lay person initiates complaint processing system without counsel) and Pettway v. American Cast Iron Pipe Co., 411 F. 2d 998, 1005 (5th Cir. 1969) and Sanchez v. Standard Brands, Inc., 421 F 2d 455 (5th Cir. 1970); FPM Ltr. 713-21 pp3-4 (Sept. 21, 1973) one of several CSC policy statements adopted by the EEOC on an interim bases 43 F.R. 60900, December 29, 1978). I believe that this duty is a sliding standard of care - based on what the reasonable trier-of-fact should do when faced with a claimant who is either unrepresented (There is no right to effective counsel in administrative proceedings, See Goodman v. Commonwealth, 400 A.2d 939 (Pa. Comm. 1979); Hess v. Secy's of Hew, 497 F2d 837, 840 n..4 (3d Cir. 1974). "or not represented by competent counsel." (Brittingham at 610.). The Trier-of-fact must exercise a hightened level of care when he or she is "organizing the creation of the record.(Brittingham

611; cf. Hackley at 140 n. 130 (1.. (The record (should be) molded...considering the needs of the court and the proper legal standard and data for assessing and demonst rating the existence of discrimination.") When a complainant is faced with a siuta-tion (where the right to conduct discovery or secure compulsory service is as such), the Trier-of-fact then has a duty to "vigilant-ly safeguard (the Complainant's procedural rights and to secure for (the Complainant) documents and data relevant and reasonably) necessary for the presentation of (the Complainant's case) or for an effective cross-examination of witnesses, (otherwise, the limited rights that do exist are) trans formed...into mere illusory guarantees. (Compare Hackley at 140 with Barnes v. Chattertown, 515 F. 2d 916, 920 (3d Cir. 1975) and Higgins v. Kelley, 475, F3d 789, 793 (3d Cir. 1978) (where latter two are federal personnel cases in which the Trier-of-fact have comparable authority as an EEOC Examiner), and Brown v.

United States, 377 F. Supp. 530, 539 N.D. Tex. 1974) (agency must makea suffucient "showing of administrative inconvenience" on why a witness cannot be availabbe for live testimony; and the Trier-of-fact must not just accept the statement but look to see if facts support alleged reasons). Failure of the Trier-of Facts to scrutinize or demand an adequate explanation would be adenial of due process "It is basic due process thatthe Government cannot set up regulations and then disregard them. (Brown supra note 158.) Hearsay evidence cannot be a part of the basis of the Trier-of-Facts decision unless it is the type of hearsay sufficiently convincing to a reasonable mind. (Richardson v. Perales, 402 U.S. 389 (1971). And hearsay lacking sufficient assurance of its truthfulness is not substantial (let alone a preponderance of) evidence to overcome the sworn testimony of a claimant. (Reil v. United States, 456 F2d 777 (ct. Cl. 1972); See Pascal v. United States

543 F2d 1284, 1287 (Ct. Cl. 1976) query: What weight does int 7 have?)

(A.P. 20, 21) Magistrate Cohen failed to comply with Rule 3(a)(B) of the Rules for United States Magistrates in the United Sates District of Massachusetts (Effective January 15, 1981 As Amended through March 2, 1988. Rule 3(a)(B) In all reports and recommendations entered filed under the provisions of Rule 3(a)(A) above, the United States Magistrate shall incorporate therein clear notice to the parties that failure to file timely and appropriate objections to that report and recommendation under the provisions of Rule 3(b) of the Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Mass, shall constitute a waiver of the right to appeal the district court's order to the United States Court of Appeals. That notice may consi st of the following language - The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for

United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for each objection. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court's order entered pursuant to this Report and Recommendation. See United States v. Emilinao Valencia Copeto, F2d. No. 85-1674 (1st Cir. May 29, 1984) Park Motor Mart, Inc. v. Ford Motor Co., 616 F. 2d 603, (1st Cir. 1980) United States v.

Vega, 678 F2d 376,378-379 (1st Cir. 1982) Scott v. Schweiker, 702 F2d 13, 14 (1st Cir. 1983) see also Thomas v. Arn U.S. 38 Crim. L. Rept. 3031 (December 4, or such other language which clearly conveys the effect of failure to comply with the provisions of Rule 3(b) of these Rules as set forth the the United States Court of Appeals for this Circuit in United States v. Emilinao Valencia Copete, ___F.2d__, No. 85-1674 (1st Cir. May 29, 1984).

The Court denied the plaintiff proper examination...see the following: T1-34 L23, 25, T1 33 L2-7, T1 03 L20-25, T1-35 Li-3, T1-43 L15-20 and T2-210.

Federal Personnel Manual System - FPM Letter 300-25, Subject: Uniform Guidelines On Employee Selection Procedures introduce into the Federal personnel system significant new considerations and a body of technical criteria relating to the use of selection procedures. Their purpose is not to prohibit or inhibit the use of tests, qualification standards or

eligibility-determining facts related to successful job performance. Rather, they are intended to provide a set of professionally recognized principles to assist in determining whether and to what extent, selection procedures are related to job performance in a situation of adverse impact. In so doing, the guidelines follow the precedents set by a line of judicial decisions under Title VII of the Civil Rights Act recognizing as the Supreme Court did in Griggs v. Duke Power Co. that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Explaining further, the Court said: Nothing in the (Civil Rights) Act precludes the use of testing or other measuring procedures: obviously they are useful. What Congress has forbidden is giving these devices and mechanics controlling force unless they are demonstrably a measure of job performance. The guidelines are a means of making the

required showing. The Court erred in its Findings of Fact, Opinion dated May 31, 1988. See (7) James Leahy testified that the rating and ranking was not done by the Review Board. (T2-151 L9-11, T2-162 L20-25 T2-153 L-3). Also in violation of FPM 335 and PB21140 3/16/78 D. Review Committee (Govt. Exh. #2). (9) Frank Dunford was assigned to Springfield, MA., and, therefore, was not eligible to apply for this position. Mr. Leahy as Personnel Representative, on the Review Board was responsible to see that all laws and regulations were met. This he failed to do. (12). Mr. Bladdelll, the Acting Director of Employee and Labor Relations (2 months) as a supervisor of the position to be filled nor any manager exercising authority over the supervisor up to and including the selection official may serve on the review committee or participate in its deliberation (PB 21140 Gov. Exh. #2 V. Competive Procedures B. Nominations.) Exhibit Gov. #1 p46, 47, 48 Ex-

perience Requirement states "(2) Substitution of education for specialized experience is not appropriate for this position." Mrs. Monagle had on the job training the Safety Section from 1976 to 1978. (13) Not relevant to Ann. #8020. (14) Mr. Dunford was 48 years old. Mrs. Monagle was 57. (15) Not relevant to Ann. #80-20. (18) Mr. Dunford's supervisor's recommendation was based on work done by Mr. Dunford in the Security Field, Supervisor of guards. (21) Mr. Sullivan based his selection on Mr. Blaudell's recommendation. Mr. Blaudell based his recommendation "On education and experience) in violation of Ann. #NC80-20 (Gov. Exh. #1 P46, 47, 48).

SUMMARY OF ARGUMENT

It is the opinion of the plaintiff that the plaintiff did not receive a full and fair hearing. The plaintiff believes that the Trier-of-Facts must be unbiased by denying preferential treatment and must seek out the facts especially when the plaintiff lacks legal training and experience.

In the pursuit of justice, the Trier-of-Facts has broad powers and should utilize his skills, knowledge, and ability when there is no jury by giving the plaintiff the right to present all evidence that may aide in the production of facts necessary to make a fair and equitable decision.

It is a natural disadvantage to be against a powerful agency such as the United States Postal Service. The defendants had at its disposal trained personnel in field of equal employment opportunity, labor relations, and personnel operations. The failure of these people to enforce the laws and regulations regarding equal employment opportunity and personnel operations leads to preferential treatment to some and whenevere there is preferential treatment to one there is discrimination to another. Messrs. Sullivan, Blaudell, Leahy, Parkes, and Ms. Katherine Shanahan had EEO training and in spite of all this training and bokground they failed to conform with the Affirmative Action Plan, postal regulations,

and the "Uniform Guidelines on Employee Selection Procedures."

The plaintiff believes that the callous indifference to the equal employment opportunity laws; the postal regulations; the court allowing the defendant the right to present and utilize irrelevant and inmaterial facts i.e., (veteran, engineer, supervisor, education) has prejudiced her position. The actions of the United States Postal Service in giving preferential treatment to the selectee was not only disparate treatment but did cause an adverse impact thus denying the best qualified candidate the promotion. The credibility of the testimony of James Leahy, Philip Sullivan, Ramon Claudell, and Ms. Shanahan all of who testified that they were not aware that the "Uniform Guidelines on Employee Selection Procedures" applied to the United States Postal Service; snf, therefore did not utilize them. All of these people received equal employment opportunity training and probably assisted in the forma-

tion of the Affirmative Action Program at the Boston MSC and should have been aware of disparate treatment and adverse impact. The history of the Safety Section showed no woman was evere above EAS-11. It would also show that all men had served in the same capacity as the plaintiff had been promoted to EAS-14 or better. These records were denied the plaintiff and the court sustained the object to the questioning to the complement of the Safety Section.

If the regulations on upward mobility opportunity had been enforced the plaintiff would have been no less than an EAS-14 but more likely have reached the journeyman level in the Boston Management Sectional Center EAS-16.

Mr. Parkes, Safety Manager, prior to the selection in his evaluation of Mrs. Monagle stated "She is capable of performing Safety Specialist duties, and recommend she be favorable considered for Safety Specialist position."

Mr. Parkes, Safety Manager, in his evaluation

of the selectee, after working under his supervision stated, "It is not often that personnel new to the safety field can become effective safety representative in so short a time."

The plaintiff had proven on the job experience. The selectee had potential but did not have any safety experience as required.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Dated: Medford, Massachusetts

July 6, 1989

Respectfully submitted,

Helen T. Monagle

Helen T. Monagle

Pro Se

APPENDIX

COPY

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 88-1678

HELEN T. MONAGLE,

Plaintiff, Appellant,

v.

William F. Bolger,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

(Hon. David S. Nelson, U.S. District Judge)

Before

Bownes, Torruella and Selya, Circuit Judges.

Helen T. Monagle on brief, pro se.

Leila R. Kern, Assistant U. S. Attorney, Frank L. McNamara, Jr., United States Attorney James A. Friedman and Jesse L. Butler, Office of Labor Law, U. S. Postal Service, on brief for appellee.

April 25, 1989

Per Curiam. We have carefully reviewed the record, including the trial transcript, the briefs and the district court's opinion. There is sufficient evidence in the record to support the court's findings of fact and they are not clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273 288 (1982). The district court found that plaintiff failed to substantiate her claim of age and sex discrimination with evidence refuting the defendant's showing of a non-discriminatory reason for its actions. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). We agree. We also affirm the dismissal of the retaliation claim substantially for the reasons stated by the district court.

Affirmed.

COPY

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO. 88-1678

Helen T. Monagle

Plaintiff, Appellant

v.

Anthony Frank

MOTION FOR ENLARGEMENT OF TIME TO FILE A PETITION FOR RE-HEARING IN BANC

Plaintiff, Helen T. Monagle, Pro Se, requests an extension of time...thirty days starting May 25, 1989 and ending June 25, 1989 because of the failure of the United States Court of Appeals For The First Circuit to inform me of the time limits thus denying me a full and fair hearing as required by due process of law.

Respectfully,

Helen T. Monagle, Pro Se

Dated May 25, 1989

CERTIFICATE OF SERVICE

I, Helen T. Monagle, hereby certify that I

I have hand delivered the Motion for Enlargement of Time To File A Petition For Pre-Hearing In Banc to Leila Kern, Esq., Assistant U. S. Attorney, 1107 USPO & Courthouse, Boston, MA 02109

Hand Delivered 5/25/89

Signed

Helen T. Monagle

Pro Se

COPY

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 88-1678

HELEN T. MONAGLE,

PLAINTIFF, APPELLANT,

v.

WILLIAM F. BOLGER,

Defendant, Appellee

ORDER OF COURT

Entered June 6, 1989

This court constructively recalls mandate. We deny the motion for enlargement of time and re issue mandate.

By the Court:

Francis P. Scigliano

Clerk

(cc: Ms. Monagle, Ms. Kern, and Messrs. Hurley Friedman)

COPY 4

PATRICIA J. BARRY - Attorney at Law
1066 National Press Bldg. Washington,
D.C. 20045 (202) 347-6463

July 30, 1981

Katherine Shanahan, EEO Administrative
Officer
Equal Employment Opportunity Office,
Room 4001
U. S. Postal Service
General Mail Facility
Boston, MA 02205

RE: CHARGE OF REPRISAL, Helen Monagle

Dear Ms. Shanahan:

On behalf of my client Helen Monagle, I am hereby filing a charge of reprisal pursuant to 29 U.S.C. §1613.262(b)(1) and therefore invoking the expedited charge route so that agency investigation must be completed within fifteen days. We do NOT want the formal complaint processing. The charge is based on continued and repeated denial of administrative (official) leave which Ms. Monagle

specifically requested both for April 7 and then for July 28, eight hours each. The first request was to enable Ms. Monagle to be present during depositions of adverse witnesses which I conducted on April 7 in connection with the court case growing out of and based, along with claims of age discrimination, on her administrative complaint of sex discrimination against the U. S. Postal Service. §1613.214 (4)(b), supra states, inter alia, that "(if the complainant is an employee of the agency, he (sic) shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status."

U. S. Postal Service unilaterally has interpreted this portion of the regulation as meaning that once the matter is in court, the complainant is no longer entitled to official time to "present her complaint". However, such an interpretation misses the mark for several reasons: (1 The regulation does not limit itself

merely to the administrative proceeding with respect to where the complaint is "presented", (2) the ultimate place where most administrative complaints end up is court, and §717 of Title VII, as well as the §1613 regulations anticipate this, since Congress and the Supreme Court recognize the right of federal employees to have trials de novo on complaints of employment discrimination; Title VII and the regulations which implement the statute, viz., §1613, are remedial legislation, and the Supreme Court recognizes Title Vii Plaintiffs, like Ms. Monagle, as "private Attorneys General" who are achieving relief, not just for themselves but for all employees of the agency (See Newman v. Piggie Park Enterprises, 390 U. S. 400 (1968) and therefore should be accorded as much assistance as possible; and finally, Ms. Monagle is up against the system, the Postal Service, and its unlimited resources - person -

power, equipment, money. It uses enormous amounts of taxpayer dollars to defend employment cases, as evidenced by this case in which there have been three attorneys working on the case who interview and prepare and rehearse witnesses on government time and on government premises. The inequality in economic power between the two parties, Ms. Monagle and those who have been given authority to act as agents for our government is, to say the least, awesome, and generally overpowering for any complainant who dares to challenge the government as her employer.

With respect to the second denial of leave, however, the above defense of the Postal Service is not relevant. Ms. Monagle asked for eight hours leave in order to meet with me, her representative, to prepare for the administrative hearing, which took place the following day, on July 29. She was summarily denied such leave by her supervisor, Don Parkes. The request is reasonable in-

asmuch as prior administrative leave granted to Ms. Monagle for her prosecution and presentation of her complaint of sex discrimination is nominal; the opposing counsel, Postal Service attorney Barbara Fredericks and her assistant, James Friedman, have met with witnesses on government time in order to defend Ms. Monagle's case; and, there is no clear definition of what "reasonable official time" is, except that it should have no extreme detrimental impact on the agency mission and it should be sufficient so that the complainantt is able to prepare adequately in order to present her complaint.

I request an immediate expedited investigation into this matter, since Ms. Monagle will be requesting additional leave time in order to present her complaint in court. We seek the following relief:

1. Criteria defined, at least for Ms. Monagle's case, and handed to her supervisor to be used as guidelines for granting or denying official time to her;

4e

2. Annual leave taken by Ms. Monagle on April 7 and July 28 be changed to reflect the time as administrative leave;

3. Establishment of precedent for the rathe tortured interpretation of the Postal Service concerning the meaning of "Presentation of complaint" as that language is found in §1613.214 (4)(b) if Postal Service does not abandon said interpretation.

I look forward to hearing from you at your earliest convenience.

Sincerely

Signed

Patricia J. Barry

5 XX

2400 Conn AV., N.W., #603-A 08 COPY

Katherine F. Shanahan

Man ger, Employee Relations

Boston, Massachusetts 02205

RE: Charge of Reprisal, July 30, 1981

Dear Ms. Shanahan:

In response to your letter of September 2, 1981, you have missed the point. In order to bring claims of reprisal before the Court, Ms. Monagle must exhaust certain administrative remedies. The letter of July 30 is a charge of reprisal I filed on her behalf pursuant to 29 U.S.C. §1613.262(b)(1). Filing a charge of reprisal under the expedited procedureis sufficient to exhuast remedies. See Kulkarni v. Hoffman ___ EPD ___(D.C. Cir. 1978).

The reason the letter was addressed to you is because Ms. Monagle informed me that you accept complaints of discrimination. I assumed therefore you accept charges of reprisal as well. I insist that the Postal Service conduct an investigation into the charge of reprisal concerning the

the denial of official time. Whether you have the power to grant administrative leave is not relevant; However, I disagree with you concerning the immediate supervisor's discretion to grant or not to grant administrative leave pursuant to the EEO regulations. In any event, whatever his discretion is, Mr. Parkes denial cannot be tainted with a discriminatory animus or one of reprisal against Ms. Monagle. This is the issue which we raised in our charge, viz., that Mr. Parkes denied administrative leave improperly and did so to discriminate and reprise against Ms. Monagle because of her pursuit of her EEO complaint.

Sincerely,

Patricia J. Barry

COPY 6

United States Postal Service
Employee Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4200

November 4, 1986

MEMORANDUM FOR REGIONAL DIRECTORS AND
FIELD DIRECTORS HUMAN RESOURCES

SUBJECT: Official Time -
Mitchell v. Baldridge

On July 18, 1987, the United States District Court for the District of Columbia held in Mitchell v. Baldridge, 662 F. Supp 907 (D.D.C. 1987) that a plaintiff suing the Department of Commerce and alleging discrimination prohibited by Title VII of the Civil Rights Act of 1964 was entitled to be paid for"...reasonable time for attendance at depositions, meetings with counsel, other ordinary and legitimate pretrial undertaking that require the attendance at trial." As you know, our leave regulations in the Employee and Labor Relations Manual

and our official time policy for complainants, representatives, and witnesses in the EEO process do not contemplate compensation for those individuals if they are otherwise in a duty status, for time spent preparing for or during U. S. District Court litigation. Inasmuch as no other U. S. District Court has arrived at this same conclusion and there is a serious question whether this decision correctly states the law, current policy not to compensate complainants or their postal employee representatives for time spent in preparation for or during court litigation will remain in effect except, in appropriate cases, in the U. S. District Court for the District of Columbia. Field installations should seek guidance on this issue from the Office of Labor Law or Office of Field Legal Services attorneys handling particular cases.

Signed:

Joel G. Frosch

Assistant Postmaster General

cc: Mr. Fritsch

Mr. Alpern

Regional Labor Counsels

Appeals Review Coordinators

Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-41

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

HELEN T. MONAGLE, Petitioner

against

Anthony M. Frank, Postmaster General of the United States, Respondent

Supplemental appendix on Writ of Certiorari To The United States Court of Appeals For The First Circuit

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SUPPLEMENTAL APPENDIX - PETITION FOR WRIT OF CERTIORARI

Helen T. Monagle
78 Bristol Road
Medford, Massachusetts
Pro Se

25pg

SUPPLEMENTAL APPENDIX

Written Opinion issued by David S. Nelson United States District Court Judge, U. S. District Court for the District of Massachusetts, May 31, 1988.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

HELEN T. MONAGLE,

Plaintiff,

v. CIVIL ACTION

Preston R. Tisch, NO. 80-2635-N

Defendant.

NELSON, D.J. MAY 31, 1988

OPINION

Introduction.

Plaintiff brings this action for legal and equitable relief, alleging sex discrimination by the defendant in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16(e) (hereinafter Title VII) and age discrimination contrary to the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §633a(hereinafter ADEA). A trial having been conducted, it is left to this Court to make findings of fact and rulings of law.

1. Findings of Fact.

1. Plaintiff was born on September 6, 1923. (Exhibit 1, p. 39.)

2. Plaintiff began employment with the Postal Service as a clerk-stenographer in 1967; she was later transferred to the safety section in the same position in 1976. (Id.)

3. Plaintiff has a high-school education, having graduated from high school in 1941. She has obtained no additional educational degree. (Id.)

4. Postmaster Philip L. Sullivan promoted plaintiff to the position of Safety Technician, EAS-11, in 1978. (Id.)

5. The postal service posted the position of Safety Specialist (00184-5004) on March 24, 1980 and advertised it under Vacancy Announcement NC-80-20. (Exhibit 1, p. 46).

6. Eleven persons applied for this position in addition to the plaintiff. They were both male and female. (Exhibit 1, P.70).

7. Winifred M. Henderson, Francis T. Dunford, and the plaintiff were placed on the

"most qualified" list for the position after the initial evaluation process, which included interviews. These persons were placed on the list by the review committee on May 6, 1970. (Testimony of James Leahy, Tr. 2-158 161-62; Exhibit 1, p. 12.)

8. Out of four persons interviewed for the position, one was not selected to make the list of most qualified candidates. He was Robert Messenger. (Testimony of Leahy, Tr. 2-148-49; Philip Sullivan, Tr. 2-4; and Ramon Bladuell, Tr. 2-97-98; Exhibit 1, P. 13).

9. The candidates on the final "most qualified" list were Postal Service Employees from within the area of consideration for the job vacancy. (Testimony of Sullivan, Tr. 1-115-16, 136, 143; Exhibit 1, pp. 14, 26, and 39; Defendant's Exhibit 2, p. 6, n.2.)

10. The selection process the three applicants faced involved review of the applicant's Form 991s' their applications, evaluations by their supervisors, and the candidates'

responses during interviews. (Testimony of Bladuell, Tr. 2-77; Leahy, Tr. 2-153-54, 158-59, 161, and 163; and Sullivan, Tr. 2-14-15.

11. In May, 1980, the official responsible for final selection of the candidate to fill the Safety Specialist position was Postmaster Philip L. Sullivan. (Testimony of Sullivan, Tr. 1-105,111; Tr. 2-5.)

12. Sullivan received a recommendation on May 12, 1980 from Ramon E. Bladuell, Acting Director of Employee and Labor Relations (hereinafter E & LR) and functional director responsible for the Safety Section, advising him that Dunford was the best choice for the vacant position. Bladuell made this recommendation on the basis of Dunford"s "education and experience shown." (Testimony of Bladuell, Tr. 2-59, 77, 98; and, Sullivan, Tr. 1-129, Tr. 2-5, 6; Exhibit 1, P. 10.)

13. During these events, the Boston Management Sectional Center (Hereinafter MSC) was a highly mechanized facility for processing mail. (Testimony of Bladuell, 2-119-20;.

Sullivan, Tr. 2-7.)

14. Dunford's birthdate is May 24, 1932, making him almost 48 years old in this period. (Exhibit 1, p. 14).

15. Applicant Dunford had worked in two major corporations, specializing in manufacturing and product engineering. He had contact with machinery on the job; he had also been a security police supervisor in an EAS-14 position. His educational experience was also relevant to the postion: he received a B.A. from the University of Massachusetts in Management and he received an A.S. degree from Boston University in Engineering. (Testimony of Sullivan, Tr. 2-9, 10, 14; Exhibit 1, pp.14-24.)

16. He also had specialized safety experience: he was a First Aid Instructor for the American Red Cross, a CPR Instructor for the American Heart Association, and a certified motor vehicle Accident Investigator. (Testimony of Sullivan, Tr. 2-10-13: Exhibit 1, pp. 14-24.)

17. The candidate Dunford was also a veteran. (Id.)

18. Dunford received an excellent recommendation without qualification from his supervisor urging his selection for the Safety Specialist position. (Testimony of Sullivan, Tr. 2-13; (Exhibit 1, pp. 14-24.)

20. Sullivan selected Dunford for the supervisory re-assignment to the position of Safety Specialist (A), EAS-14, because he believed Dunford was the best qualified person for the position. (Testimony of Sullivan Tr. 1-106-07; Tr. 2-9-1-.)

21. Sullivan made his decision on the basis of Dunford's experience as a Security Police Supervisor and his engineering background. He thought that these experiences made him better qualified than his competitors for the position. (Testimony of Sullivan Tr. 2-9-10, 14, 52, 53.)

22. The funcional director above the safety section, Bladuell, also based his determination and recommendation regarding Dunford's qualifications on these same factors. (Testimony of Bladuell, Tr. 2-119-20.)

23. Sullivan believed, in good faith, that Dunford was a better qualified candidate for the Safety Specialist (A) EAS-14 position than the other two "most qualified" applicants. (Testimony of Sullivan, Tr. 1-106, Tr. 2-9-10, 14-15.)

24. Sullivan did not make his decision on the basis of the sex or age of any of the candidates. There is no credible basis to conclude otherwise. (Testimony of Sullivan, Tr. 2-14-15.)

25. No Postal Service procedures were violated during the May, 1980, selection process. (Testimony of Leahy, Tr. 2-163; Katherine Shanahan, Tr. 2-138; and Sullivan, Tr. 2-55; Exhibit 1, P. 11.)

II Rulings of Law

A. Sex Discrimination

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16(e) prohibits all discrimination in federal employment based on sex, U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983), citing

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). The central issue in a discrimination suit involves the question of whether or not the plaintiff has proved intentional discrimination by a preponderance of the evidence. White v. Vathally, 732 F.2d 1037, 1040 (1st Cir. 1984).

2. This is the central focus of the case. Johnson v. Allyn & Bacon, Inc., 731 F.2d, 64, 69 (1st Cir. 1984); Hooker v. Tufts University 581 F. Supp. 104, 106 (D.Ma. 1983). This may often be proved by adoption of a "but for" causation test: that is, save for the discrimination of the employer, the applicant would have been hired. Loeb v. Textron, Inc., 600 F. 2d 1003, 1019 (1st Cir. 1979).

3. The plaintiff bears the ultimate burden of proving her case. Burdine, 450 U.S. at 230; Sweeney v. Board of Trustees of Keene State, 604 F 2d 106 (1st Cir. 1979).

4. The Supreme Court provides the courts with a three-step procedure for allocating burdens of production of evidence in a Title VI

case. U. S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); White v. Vathally, 732 F.2d 1037 (1st Cir. 1984); Johnson v. Allyn & Bacon, Inc. 731 F.2d 64(1st Cir. 1984).

5. The plaintiff's task begins with her initial burden producing evidence of a prima facie case of discrimination by a preponderance of the evidence. Burdine, 450 U.S. at 252-53. As the Supreme Court stated:

> The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.

Id. at 253.

6. A plaintiff's prima facie case will normally involve three elements. They require:

(i) proving that plaintiff belongs to a protected group;

(ii) proving that the plaintiff applied

for and was qualified for the promotion; and

(iii) proving that the plaintiff was rejected under circumstances which give rise to an inference of unlawful discrimination.

McDonnell Douglas, Supra at 802.

7. Proof of a prima facie case shifts the burden of persuasion to the defendant, who then shoulders the burden of proving a gender-neutral reason for his employment action. U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); White v. Vathally, 732 F2d 1037 (1st Cir. 1984; Johnson v. Allyn & Bacon, Inc., 731 F2d. 64 (1st Cir. 1984). To accomplish this the defendant must present facts allowing the trier of fact to rationally conclude that the employment decision had not been motivated by discriminatory intent. Burdine, 450 U.S. at 254-55.

8. The employment of a person because of superior qualifications to the plaintiff constitutes a genuine basis for selection and, unless discredited, defeats a claim of discrimination. Holder v. Old Ben Coal Company, 618 F.2d 1198, 1201 (7th Cir. 1980); Parker v. The Board of School Commissioners. 558 F. Supp. 680, 682 (S.D. Ind. 1983).

9. This court finds that the defendant met his burden of persuasion and rebutted the plaintiff's prima facie case at trial by his production of evidence showing that legitimate, gender-neutral factors motivated the Postmaster's decision not to promote the plaintiff to the position of safety specialist. The testimony of both Sullivan and Blaudell, was not effectively challenged by plaintiff. Both testified that while plaintiff was qualified, the winning candidate was better qualified because of his work performance experience, and education.

10. First, the winning candidate, Francis T. Dunford, was already an EAS-14 who

had served as supervisor of the Security Police Officers. Thus, he already had supervisory experience. Plaintiff was only an EAS-11 with little, if any, supervisory experience.

11. Dunford also had specialized safety experience as a certified motor vehicle accident investigator, and also had training in first aid and cardiopulmonary resuscitation. Plaintiff has no record of any of these skills.

12. Finally, Dunford had specialized educational training related to the job of Safety Specialist; he had an engineering degree in business management, an asset in a supervisory job. Plaintiff, on the other hand, did not have this specialized training.

13. Having found that the defendant has set forth legally sufficient evidence for the plaintiff's rejection, the presumption raised by the plaintiff's prima facie case has been rebutted, and this court looks to plaintiff for a showing by a preponderance of the evidence that the proffered reason is in fact

a pretext, Burdine, 450 U.S. at 255-56; Johnson v. Allyn & Bacon Inc., 731 F.2d 64, 71 (1st Cir. 5 1984).

14. Plaintiff must demonstrate how her qualifications exceeded those of Dunford in order toprove that those reasons are a pretext.

15. To meet this burden, plaintiff must persuade the court that either a discriminatory motive more likely than not motivated the employer, or that the employer's stated explanation is unworthy of credence. That is, this must decide which party's explanation of the employer's motivation it believes. U.S. v. Postal Service Bd. of Governors v. Aiken, 460 U.S. 711, 716 (1982), citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987); White v. Vathally, 732 F.2d 1027, 1042 (1st Cir.1984).

16. Plaintiff produced neither evidence that a discriminatory animus motivated the Postal Service, nor any evidence to contradict

the reasons given for the defendant's decision

17. According to plaintiff, Sullivan and Blaudell paid no attention to the adverse impact of their actions, thereby violating applicable laws and regulations. She also indicates that the Postal Service erred by failing to develop better tests or evaluation designs. This theory, however, has no place in this case. As the First Circuit Court of Appeals has reiterated that in order to prove anindividual claim of discriminatory treatment, whether under the Constitution or under Title VII, a plaintiff must prove purposeful discrimination. White v. Vathally, 732 F.2d 1037, 1039 (1st Cir. 1984) citing Washington v. Davis, 426 U.S. 229, 239-41 (1976).

18. The plaintiff also argues that she was not appointed to an Upward Mobility Position in accordance with Federal Personnel Manual System Letter (hereinafter FPM Letter) 713-25. Plaintiff's Exhibit 3. She asserts that she did not receive the kind of training and development opportunities she claims she

was entitled to by virtue of that instruction. Id. She asserts that the voluminous material she refers to regarding postal regulations proves a systematic disregard by the Postal Service for its obligations under the Upward Mobility Program.

Unfortunately, plaintiff has not shown that this failure resulted in her rejection for the promotion. She has not shown the court that "but for" her skills training under the program, she would have been promoted. (Loeb v. Textron, Inc., 600 F.2d 1003, 1019 1st Cir. 1979); Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979).

19. Plaintiff cannot meet her burden of showing pretext merely by refuting or questioning the defendant's stated reason.

20. Qualifications for the successful candidate, plaintiff maintains, were improperly inflated by the Postal Service. According to plaintiff, the Postal Service substituted non-required for required experience. This, she says, violated various postal regulations.

Exhibit 1 p. 48.

21. A misjudgment by the employer of qualifications does not in itself lead to a finding of discrimination under Title VII. Burdine, 450 U.S. at 259.

22. Without specific evidence of intentional discrimination, statistical data is entitled to little weight in light of the small number of personnel in the Safety Section. Meehan v. New England School of Law, 522 F. Supp. at 499.

23. Plaintiff has submitted extensive evidence that she says indicates defendant has violated its own regulations and procedures. This court finds that this claim has been refuted by witness testimony. Testimony of Leahy, Tr. 2-163; Katherine Shanahan, Tr. 2-138 and Sullivan, Tr. 2-55; Exhibit 1, p. 11.)

24. Assuming arguendo that the plaintiff's claim is accurate, the procedures allegedly violated do not support a finding of unlawful discrimination. Meehan v. New England School of Law, 522 F. Supp. 484, 198 (D.Ma. 1981); Johnson v. Lehman, 679 F 2d 918, 922 (D.C. Cir.

1982). She has not shown the necessary discriminatory intent behind the violations. Id.; Page v. Bolger, 645 F.2d 227, 232-34 (4th Cir. 1980).

25. Plaintiff has not overcome her burden in this case. She has not offered any evidence that defendant's reasons for selecting Dunford over her were in fact a pretext for sex discrimination. Having failed to show this, she has also failed to show that her qualifications were actually superior to those of Mr. Dunford. She has not rebutted the testimony of Messrs. Sullivan and Bladuell that Dunford was chosen for non-discriminatory reasons. She does not explain why Sullivan would post the position for competitive bidding in order to indirectly; by passing her solely because of her sex.

B. Age Discrimination.

1. The Age Discrimination in Employment Act, specifically section 15, 29 U.S.C. §633a, prohibits age discrimination in federal employ-

ment. Lehman, Secretary of theNavy v. Nakshian, 453 U.S. 156 (1981).

2. The federal courts employ the same procedures in determination of whether or not age discrimination exists as they do in determination of whether the employer has discriminated in violation of Title VII. Loeb v. Textron, Inc., 600 F.2d 1003, 1015 (1st Cir. 1979) see Section II A. 1991 1-8, supra.

3. The question before the court is not whether or not the subjective business decisions of the employer are correct or represent good judgment. Rather, the question is simply whether the reasons for the decision as articulated by the employer are merely a pret ext for age discrimination. Loeb 600 F.2d at 1012, n. 6.

4. If the person promoted in place of the plaintiff is himself a member of the protected class and is only slightly younger than the plaintiff--the situation presented here--it is more difficult for the plaintiff to prove her case of age discrimination. Pace .

v. Southern Railway System. 701 F.2d 1383, 1390 - (11th Cir. 1983); see 29 U.S.C. §631.

5. Accordingly, the plaintiff bears the final burden of persuasion in this case; she must prove that the defendant intentionally discriminated against her on the basis of her age. Loeb, 600 F.2d at 1011-12. Plaintiff has offered no evidence to the effect that there was intentional discrimination based on her age; the defendant has offered uncontroverted testimony by Messrs. Sullivan, Bladuell, and Leahy that there was no intent.

C. Reprisal.

1. Title 29 of the Code of Federal Regulations, section 1613.261 protects a plaintiff from reprisal at any state in the presentation and processing of a complaint. 29 C.F.R. §1613.261 (1982).

2. This does not exempt a plaintiff from the requirement that she exhaust her administrative remedies by filing a charge of reprisal with an appropriate agency official before

a civil action is initiated on the basis of claimed reprisal. 29 C.F.R. §1613.262(a).

3. Under the regulations governing complaints of reprisal, a claimant must lodge her complaint with the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity A Federal Women's Program Coordinator, and such other officers as the agency may designate for that purpose. 29 C.F.R. §1613.214(a)(2).

4. Plaintiff has not submitted evidence that she filed her complaint with an appropriate official. Instead, a complaint was filed with Katherine Shanahan, who was not an official for purposes of receiving complaint of reprisal. No evidence has been presented to this court that Shanahan was the proper official. Thus, plaintiff has not exhausted her administrative remedies.

5. Plaintiff's rights were not abrogated by the denial of official time for taking of a deposition in connection with a civil law-

suit or for preparation for an EEO hearing. Plaintiff is only entitled to a reasonable amount of time to present her complaint. 29 C.F.R. §1613.214(b) (until November 20, 1987, 52 F.R. 41920, 41923 was in effect).

II. Postscript.

The court understands that the plaintiff bore a heavy burden when she elected to proceed pro se. A discrimination case is never simple and is always serious. Consequently, this court has labored long and hard to one, insure that plaintiff's allegatons have been heard, and two, to facilitate, whenever possible, a settlement acceptable to all parties. Plaintiff insisted that only a full trial of her claims would satisfy her demands. This was her right, and the court responded accordingly. But with plaintiff's decision came an obligation to abide by the Federal Rules of Civil Procedure and Evidence. While the court believes it has given the plaintiff the benefit of the doubt, it cannot in any way say that plaintiff has met her burden:

demonstrating the present of intentional age or sex discrimination and the proper exhaustion of remedies in prosecuting her allegations of reprisal.

ORDER

Judgment for the defendant shall, in accordance with these Findings and rulings, enter on the discrimination and reprisal counts.

SO ORDERED.

Signed:
David S. Nelson
United States District
Court Judge